

IN THE COURT OF APPEAL
FIJI ISLANDS AT SUVA

[Criminal Appeal No. AAU 0111 of 2008]
(On appeal from the High Court in
Criminal Appeal No. AH 047 of 2008)

BETWEEN : EPELI QARANIQIO
(APPLICANT)

AND : STATE
(RESPONDENT)

Before the Acting President, Mr. Justice John E. Byrne

COUNSEL : Ms S. Vaniqi for the Applicant
: N. Nand for the Respondent

DATES OF HEARINGS
AND SUBMISSIONS : 7th December 2009, 17th March 2010

DATE OF RULING : 15th October 2010

**RULING ON APPLICATION FOR LEAVE TO
APPEAL AND ADDUCE FURTHER EVIDENCE**

- [1] On 11th March 2008, the appellant was charged with one count of Robbery with Violence contrary to Section 293(1) (b) of the Penal Code Cap. 17.
- [2] On 18th March 2008, the appellant pleaded guilty to the alleged charge at the Nasinu Magistrates' Court and was sentenced to six years imprisonment.
- [3] The appellant then appealed his conviction and the sentence to the High court.
- [4] In the High Court the appellant argued that the conviction should be set aside as he was prejudiced by lack of representation. He further argued that the plea was equivocal and that the Learned Magistrate had induced him to plead guilty so that he would then be sent to his village rather than having to serve an immediate custodial sentence.
- [5] The High Court dismissed both the conviction and sentence appeal. It found that there was no evidence to suggest that there was a plea bargain or that the plea was equivocal. Rather, the High Court found that the Learned Magistrate had taken pains to ensure that the plea was unequivocal.
- [6] As to the appeal against sentence, the High Court found that the six years imposed on the appellant was within the tariff for similar offences. Hence it dismissed both the appeal against conviction and sentence.

THE APPEAL TO THIS COURT

- [7] The appellant lodged the present appeal by way of a petition on 18th December 2008, the main ground of appeal being that his plea in the Magistrates' Court was equivocal.

- [8] The appellant seeks leave of this Court to adduce new evidence which suggests that his guilty plea in the Magistrates' Court was induced by the Magistrate's promise of a lighter sentence.
- [9] In support of his application to this Court the appellant has filed four affidavits in addition to his own and most of which are in identical terms.
- [10] He alleges that when the case was called in the Magistrates' Court on the 11th of March 2008, the Magistrate informed the appellant that it would be better for him to plead guilty and, that if he did, he would order a non-custodial sentence provided he came to the next Court date with a family member and some farming implements so that he could be sentenced to community service in his village in Gau.
- [11] On the 18th of March 2008, the appellant again appeared in the Nasinu Magistrates' Court before the same Magistrate. Present at the time was his father Kitione and sister Unaisi. However, he claims because he did not have any farming implements with him, the Magistrate proceeded to sentence him to six years imprisonment.
- [12] The other deponents to the affidavits I have mentioned were fellow remand prisoners, Christopher Walter, Harry Anderson and Viliame Colati as well as his sister, Unaisi Takayawa.
- [13] None of this evidence is reflected in the Court Record.
- [14] The appellant admits that he is bound by the written record of the Magistrate's Court. This principle was stated in *Dobui v. State (unreported) AAU 002 of 1999S* where this Court stated "*The Authorities have long established that any question of the plea tendered shall be ascertained on the record alone.*"

- [15] I have read the record carefully. There is nothing in it to justify the claims made by the appellant. Nevertheless the appellant submits that he should be given leave to appeal to the Full Court.
- [16] This Court can interfere with the decision of a lower Court if it believes that a wrong decision was made on a question of law. Contrary to the assertion of the appellant that his plea in the Magistrate's Court was equivocal, this is not supported by the judgment of the High Court delivered on the 12th of December 2008. The Learned Judge said there in paragraph 10 of her judgment: *"I see no evidence of equivocal plea. Indeed the Learned Magistrate appears to have taken pains to ensure that it was unequivocal. The appeal against conviction is dismissed."*
- [17] The Respondent submits that the appellant is questioning the ability and integrity of the Learned Magistrate. I am not prepared to make that finding, mainly because first it is not apparent from the record, and secondly as the respondent states it is the record which is the only evidence this Court can consider.
- [18] This application is really an attempt to call fresh evidence by other persons who say they were present in the Magistrate's Court at the relevant time. Therefore such evidence was available at the time of trial and in my opinion it is no answer for the appellant to say that he was unrepresented and did not know the law relating to the calling of fresh evidence. In my opinion the Court record on which I must rely is self-explanatory. Thus, on 11th of March 2008 the Court Record shows that the Learned Magistrate explained the appellant's right to Counsel and that the appellant waived his right to counsel and elected a Magistrate's Court trial. It also shows that the charge was read, explained and understood by the appellant who then pleaded guilty.

- [19] The principle applicable was stated correctly by Pain, J in *Atunaisa Buliruarua v. State (1997) FJHC 284* on a preliminary application to adduce additional evidence. The Learned Judge said this at page 3 of his judgment: *"For the purpose of an appeal, this Court accepts and acts upon the record of the Trial Magistrate. It is often accepted that in the course of a hearing a Magistrate may omit to record some matters. That is just human nature. It is not possible to keep a verbatim record. Indeed the obligation of the Magistrate is to keep a record of the substance of the evidence and submissions, etc. If something has inadvertently been omitted it can be added to the Record with the approval of the Magistrate or agreement of Counsel."*
- [20] I am satisfied that the record of the Magistrates Court here was correct and that no injustice has been suffered by the appellant.
- [21] For these reasons I refuse to make the order sought in the Notice of Motion and refuse leave to the appellant to adduce further evidence before the Full Court of this Court.

Dated at Suva this 15th day of October 2010.



A handwritten signature in cursive script, reading "John E. Byrne", is written over a horizontal dotted line.

John E. Byrne
Acting President